SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 231.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	2	1
Precipe for writ of error	2	1
Precipe for citation	3	2
Transcript from district court	4	2
Precipe for transcript	4	2
Declaration	5	2
Bill of particulars	7	4
Plea	8	5
Replication	8	5
Order beginning trial	9	5
Verdict	10	6
Order overruling motion for new trial	10	6
Judgment	11	7
Bill of exceptions	11	7
Case for plaintiff	12	7
Agreed facts	12	7
Case for defendant	15	9
Agreed facts	15	9
Exhibit A.—Act granting right of way through public lands to the Denver and Rio Grande Railway Company	21	12
Exhibit B.—Amendment of foregoing act marked "Exhibit A"	23	13
Exhibit C.—Appointment of the New Mexico Lumber Company as agent of the Denver and Rio Grande Railway Company, etc	24	14
Exhibit D.—Form of order to cut timber	26	15

	Original.	Print.
Transcript from district court—Continued.		
Bill of exceptions—Continued.		
Instructions given and exceptions	27	15
Agreed statements of facts	29	17
Agreed statements of facts	32	18
Motion for new trial	34	19
Agreement as to bill of exceptions	36	21
Judge's certificate to bill of exceptions	37	21
Clerk's certificate to transcript	38	22
Assignment of errors	39	22
Order setting cause for hearing	43	24
Order taking cause under advisement	43	24
Judgment	44	25
Affidavit of value	44	25
Precipe for writ of error and citation	46	26
Opinion	47	27
Clerk's certificate	52	29
Citation and service	53	30

1 UNITED STATES OF AMERICA, ss.

The President of the United States, to the honorable judges of the supreme court of the Territory of New Mexico, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, wherein the United States of America was plaintiff in error and the Denver & Rio Grande Railroad Company was defendant in error, a manifest error hath happened, to the great damage of said The United States of America, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in Washington within sixty days from the date hereof, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 14th day of January, A. D. 1902.

[SEAL.] JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

2 I, the undersigned, the clerk of the supreme court of the Territory of New Mexico, do hereby make return to the within writ of error, by transmitting to the Supreme Court of the United States a true copy of the record and proceedings in the cause therein mentioned, under my hand and the seal of the supreme court of the Territory of New Mexico.

[SEAL.] JOSÉ D. SENA,
Clerk Supreme Court of the Territory of New Mexico.

Be it remembered, that heretofore, on the 27th day of October, A. D. 1900, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a precipe for a writ of error, which said precipe for writ of error is in words and figures as follows, to wit:

"OCTOBER 27TH, 1900.

"Hon. JOSÉ D. SENA,
"*Clerk Supreme Court, Santa Fe, N. M.*

"DEAR SIR: Will you issue a writ of error to the district court of the first judicial district requiring the clerk of that court to send up the transcript of record in the case No. 842, wherein the United States of America is plaintiff and the Denver and Rio Grande Railroad Company is defendant.

"You will please file this letter as your precipe for the writ.

"Truly, yours,
(Signed) "A. A. JONES,
"*Special Asst. U. S. Atty.*"

3 And afterwards, on, to wit, the 22nd day of November, A. D. 1900, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a precipe for citation, which said precipe for citation is in words and figures as follows, to wit:

"NOVEMBER 20TH, 1900.

"JOSÉ D. SENA,
"*Clerk Supreme Court.*

"DEAR SIR: Please issue citation in cause No. 842, The United States vs. Denver & Rio Grande R. R. Co.

"Very truly, yours, "A. A. JONES,
"*Asst. U. S. Atty.*"

And afterwards, on, to wit, the first day of December, A. D. 1900, there filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record, which said transcript of record is in words and figures as follows, to wit:

4 Be it remembered that on the 29th day of October, 1900, there was filed in the office of the clerk of the first judicial district of the Territory of New Mexico, a præcipe, which said præcipe is in the words and figures as follows, to wit:

Hon. A. M. BERGERE,
Clerk District Court, Santa Fe, New Mexico.

DEAR SIR: Will you please prepare a transcript of record in case No. 842, The United States vs. The D. & R. G. R. R. Co. The transcript should include:

1. The declaration.
2. The bill of particulars filed by the plaintiff.
3. The plea of the defendants.
4. The joinder of issue by plaintiff.
5. Your record entries of empaneling of the jury on the trial case, including the verdict. Also the order of the court overruling motion for a new trial.
6. The final judgment in the case.
7. The bill of exceptions.
8. The clerk's certificate.

Please file this letter as your præcipe.

Very truly, yours, A. A. JONES,
Special Assistant United States Attorney.

TERRITORY OF NEW MEXICO,
First Judicial District:

Pleas before the Hon. John R. McFie, associate justice of the supreme court of the Territory of New Mexico, and judge of the first judicial district court thereof.

5 Be it remembered, that heretofore, to wit: On the eleventh day of April, in the year eighteen hundred and ninety-six, there was filed in the office of the clerk of the district court of the first judicial district of the Territory of New Mexico, a declaration, which said declaration is in the words and figures as following, to wit:

TERRITORY OF NEW MEXICO,
First Judicial District:

In the district court for the first judicial district of the Territory of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States.

To the Hon. Napoleon B. Laughlin, associate justice of the supreme court of the Territory of New Mexico, and judge of the first judicial district thereof:

The United States of America, by J. B. H. Hemingway, United States attorney for the Territory of New Mexico, sues the Denver and Rio Grande Railroad Company, a corporation duly organized according to law and doing business in the said first judicial district. For that defendant converted to its own use plaintiff's goods; that is to say, logs, lumber, and timbers, the said logs, lumber, and timbers manufactured out of trees theretofore standing and growing upon certain lands of the plaintiff, situate in the district aforesaid, described as follows, to wit:

Sections one (1), two (2), three (3), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), township thirty-one (31) N., R. 1 W., and sections twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), and thirty-six (36), township thirty-two (32) N., R. I W.

6 And the plaintiff claims ninety-six thousand dollars, together with interest and costs of this suit.

J. B. H. HEMINGWAY,
United States District Attorney, Santa Fe, N. M.
A. A. JONES,
Special Assistant United States Attorney,
Attorneys for Plaintiff.

[Endorsements.]

No. 842.

District court, first judicial district.

UNITED STATES
vs.
DENVER & RIO GRANDE RAILROAD COMPANY.

Declaration.

J. B. H. HEMINGWAY,
U. S. Dist. Atty.
A. A. JONES,
Asst. U. S. Atty.

Filed in my office this April 11th, 1896.

GEO. L. WYLLYS, *Clerk.*

And afterwards, to wit: On the same day, to wit, the seventh day of May, 1896, there was filed in the office of the clerk of said district court

the bill of particulars of plaintiff's demand, which said bill of particulars is in the words and figures as follows, to wit:

District court, first judicial district, Territory of New Mexico.

UNITED STATES OF AMERICA
vs.
THE DENVER & RIO GRANDE RAILROAD Company. } No. 642. Trover.

7 *Bill of particulars of plaintiff's demand.*

For the conversion by the defendant of 30,000 logs each of the value of $1.00	$30,000
For the conversion by the defendant of 5,500,000 feet board measure, of lumber and dimension timbers of the value of $12 per 1,000 feet	66,000
Total	96,000

All of said logs, lumber, and dimension timbers having been manufactured out of trees cut and felled upon the lands described in the declaration in this cause, and converted by the defendant on divers days and times between the first day of January, A. D. 1892, and the commencement of this suit.

J. B. H. HEMINGWAY,
U. S. District Attorney for New Mexico.
A. A. JONES,
Special Assistant U. S. Attorney.

[Endorsements.]

No. 842.

District court, first judicial district.

UNITED STATES
vs.
DENVER & RIO GRANDE RAILROAD COMPANY. } Trover. Bill of particulars.

Filed in my office this May 7th, 1896.

GEO. L. WYLLYS, *Clerk.*

And afterwards, to wit: On the eighteenth day of May, A. D. 1896, there was filed in the office of the clerk of said district court the plea of defendant, which said plea of defendant is in words and figures as following, to wit:

8 TERRITORY OF NEW MEXICO,
First Judicial District.

In the district court for the first judicial district.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE DENVER & RIO GRANDE RAILROAD Company. } No. 842. Trover.

The said defendant, by Edward L. Bartlett and Wolcott & Vaile, its attorneys, says, as and for its plea to the plaintiff's declaration herein, that it is not guilty of the wrongs alleged.

EDWARD L. BARTLETT,
WOLCOTT & VAILE,
Attorneys for Defendants.

[Endorsements.]

No. 842.

In the district court, first judicial district.

THE UNITED STATES OF AMERICA
vs.
THE DENVER & RIO GRANDE RAILROAD Company. } Plea of defendant.

Filed in my office this May 18, 1896.

GEO. L. WYLLYS, *Clerk.*

And afterwards, to wit: On the twenty-fifth day of May, 1896, there was filed in the office of the clerk of the district court a replication, which said replication is in the words and figures as following, to wit:

District court, first judicial district Territory of New Mexico.

UNITED STATES OF AMERICA
vs.
DENVER & RIO GRANDE RAILROAD COMPANY. } No. 842. Trover.

9 Now comes the plaintiff in the above-entitled cause and joins issue upon the defendant's plea filed in said cause.

GEO. P. MONEY,
United States Attorney for New Mexico.
A. A. JONES,
Special Assistant to the United States Attorney for New Mexico.

[Endorsements.]

No. 842.

District court, first judicial district.

UNITED STATES OF AMERICA
vs.
DENVER & RIO GRANDE RAILROAD COMPANY. } Trover.

Filed in my office this May 25, 1896.

GEO. L. WYLLYS, *Clerk.*

And afterwards, to wit: On the thirteenth day of September, 1900, the same being the tenth day of the regular session of the district court held at Santa Fe, New Mexico, within the first judicial district of the Territory of New Mexico, the following proceedings were had and entered of record, to wit:

UNITED STATES OF AMERICA
vs.
DENVER & RIO GRANDE RAILROAD COMPANY. } No. 842, Trover.

Now comes the plaintiff, The United States of America, by her special counsel, A. A. Jones, esq., and now comes the defendant, by its attorneys, Messrs. Wolcott, Vaile and Bartlett, and issue having been joined between said parties, and stipulations having been filed by the said parties as to the testimony in the case, thereupon comes the jury, to wit:

Vivian Griego, Valentine Pacheco, Candido Duran, Albino Ortega, J. T. Sandoval, Frank Romero, Alberto Garcia, Ramon Romero, Preciliano Garcia, Francisco Ortiz, Cruz Martinez, Trinidad Vigil, twelve good and lawful men taken from the body of the first judicial district of the Territory of New Mexico, who having duly elected, empaneled, and sworn, the truth to speak upon the issues between the said parties, hear the evidence (according to the stipulation entered into by the said parties), and the instructions of the court, and under the instructions of the court, and the evidence, return into open court the following verdict, to wit:

"We, the jury, empaneled in the above-entitled cause to try the issues joined between the parties, do find the defendant not guilty. Francisco Romero, foreman."

And thereupon the plaintiff gives notice of a motion for a new trial.

And at a session of the first judicial district court of the Territory of New Mexico, held in the city of Santa Fe, county and Territory aforesaid, on the said thirteenth day of September, A. D. 1900, the same being the tenth day of said term, the following proceedings were had and entered of record, to wit:

UNITED STATES OF AMERICA
vs.
DENVER AND RIO GRANDE RAILROAD COMPANY. } No. 842, Trover.

Again comes the plaintiff by her special counsel, A. A. Jones, esq., and again comes the defendant by its counsel, Messrs. Wolcott, Vaile

and Bartlett, and the motion for a new trial having been presented by the plaintiff in open court, and the same having been considered by the court, is hereby overruled in an order in the following words, to wit:

11 In the district court of the first judicial district of the Territory of New Mexico.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY, DEFENDANT. } No. 842.

ORDER.

Now comes the parties in the above-entitled cause by their respective attorneys, and the plaintiff now moves the court for a new trial for the reasons set forth in its motion on file in said cause, the court having duly considered said motion and the matters and things therein contained, it is considered and adjudged by the court that said motion be, and the same hereby is, overruled.

To which action of the court in so overruling said motion, the said plaintiff does now except.

JOHN R. M'FIE,
Associate Justice of the Supreme Court of New Mexico, and Judge of the First Judicial District Court thereof.

It is therefore ordered, considered, and adjudged by the court that the defendant, The Denver and Rio Grande Railroad Company, as to said charge go hence without day, and it hereby is discharged.

And afterwards, to wit: On the tenth day of November, A. D. 1900, there was filed in the office of the clerk of said district court a bill of exceptions, which said bill of exceptions is in the words and figures as following, to wit:

Territory of New Mexico, in the district court, first judicial district.

12 UNITED STATES OF AMERICA, PLAINTIFF,
vs.
DENVER AND RIO GRANDE RAILROAD COMPANY, DEFENDANT. } No. 842.

Be it remembered that on the tenth day of November, A. D. 1900, there was filed in said cause the following

BILL OF EXCEPTIONS.

Be it remembered, that on the trial of the above-entitled cause, had on the 14th day of September, 1900, the following among other proceedings were had:

TRIAL.

A. A. Jones, esq., and William B. Childers, esq., United States attorneys for the Territory of New Mexico, representing the plaintiff; and Gen. E. L. Bartlett and Wolcott & Vaile, representing the defendants.

Case of the plaintiff.

Mr. JONES. The facts which the plaintiff offers in evidence have been agreed upon and are contained in this stipulation, which is filed in the case. These facts, gentlemen of the jury, I will read to you, as counsel upon the other side has, under the stipulations, the right to make any objections to the competency, relevancy, or materiality of any of these facts.

It is agreed, first: Prior to the beginning of this suit the New Mexico Lumber Company, a corporation, was engaged in the general logging and lumbering business, and had a sawmill at Lumberton, on the Denver and Rio Grande Railroad, the same being or in the immediate vicinity of the lands described in the plaintiff's declaration.

Second: Prior to the beginning of this suit, the said The New Mexico Lumber Company did cut from the lands described in the declara-
13 tion 2,100,000 feet of lumber, and the same to that amount was furnished to and received by the defendant railroad company for its use.

Third. That at the time of said cutting the said lands were public lands of the United States, situated in Rio Arriba County, New Mexico.

Fourth. That the stumpage value of the said timber so cut and delivered to the defendant railroad company was then $2.00 per thousand feet, and the value of said lumber in the manufactured state as delivered was $9.00 per thousand feet.

Fifth. The said New Mexico Lumber Company delivered the said 2,100,000 feet of lumber to the defendant railroad company during the period of time extending from January 1, 1894, to August 1, 1895——

Mr. VAILE. From there on, in the paragraph number 5, the defendants object to the introduction of the residue of that paragraph for the reason that the statements of fact therein contained are incompetent, immaterial, and irrelevant as to the issues on trial in this case, the same relating only to the New Mexico Lumber Company, which is not a party, and in no way affecting the rights or interests in controversy between the Government and the defendant railroad company.

Mr. JONES. The plaintiff considers the remaining facts material for this reason: If the New Mexico Lumber Company, which delivered the lumber to the defendant in this case, was a willful trespasser upon the public domain, that would affect the measure of damages in this case.

The COURT. The objection will be overruled.

To which action of the court in overruling the said objection the defendant, by its counsel, then and there excepted.

14 Mr. JONES. I will complete the reading of the paragraph:

——and during such period of time said lumber company, without authority from the defendant railroad company, also cut from the lands described in the declaration 5,400,000 feet of lumber in addition to that delivered to the defendant company; that during said period of time said lumber company did not cut from private lands exceeding 100,000 feet; that the timber taken by the said lumber company from the lands described in the declaration was taken as reached upon the said lands, without reference to size or dimensions, and all available sawmill timber was taken by the said company from the said lands, and the logs piled upon the sawmill yard without reference to whether they would be

used in filling orders from the defendant railroad company or not; that the agents of said lumber company, at the time of the cutting of the said timber by it, knew that the said lands were the public lands of the United States, and that the said 5,400,000 feet of lumber was sold by the said lumber company upon the general market, in the State of Colorado. Suit has heretofore been brought by the United States against the New Mexico Lumber Company for said 5,400,000 feet of lumber, and final settlement has been made of the suit so brought. The plaintiff does not seek in the present action to recover from the defendant railroad company anything for the taking by the said lumber company from lands of the 5,400,000 feet above referred to. But no suit is pending against the New Mexico Lumber Company for the above-mentioned 2,100,000 feet, nor has the plaintiff had any recovery or judgment for the same.

Mr. JONES. That, if the court please, and gentlemen of the jury, is the case which the plaintiff submits to you.

15 *Defendant's case.*

Mr. VAILE. May it please the court, and gentlemen of the jury, on the side of the defendant certain facts have been agreed to, expressed in an agreed statement of facts, which will be filed. I will read those facts which are material for you to hear.

First. It is agreed that the defendant, the Denver and Rio Grande Railroad Company——

Mr. JONES. Now, if the court please, I desire to object to the introduction in evidence of the first paragraph of facts, for two reasons: First, the act of Congress which is sought to be thus introduced in evidence is null and void for uncertainty. It purports to grant to the railroad company the right to take timber from the public lands of the United States, from lands adjacent to the right of way. That is the only designation or description of the lands from which timber may be taken, and the term "adjacent" is indefinite, uncertain, and therefore the lands from which timber may be taken are not sufficiently described so as to render the act a valid act and confer any valid or certain rights upon the defendant railroad company. Second, because there has been no foundation laid in this case for the introduction of this special act of Congress in the pleadings. We contend that it is the duty of the defendant to plead this act and prove it, and therefore the statement contained in that paragraph is incompetent, irrelevant, and immaterial.

The COURT. The objection will be overruled.

To which action of the court in overruling the said objection the plaintiff, by its counsel, then and there excepted.

Mr. VAILE. I will commence reading this paragraph once more: It is agreed that the defendant, the Denver and Rio Grande Railroad Company,

16 is the successor to the Denver and Rio Grande Railway Company, and is and at all times herein mentioned has been entitled to all the right and benefits lawfully conferred upon the said the Denver and Rio Grande Railway Company——

Mr. JONES. I want it understood that my objection applies to both of the acts of Congress mentioned in the first paragraph.

Mr. VAILE (continuing). ——by act of Congress approved June 8, 1872, entitled "An act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," the same being found in 17 U. S. Statutes, at page 339, to which reference is hereby made, and which said statute is made a part of the agreed statement, and copy thereof is hereto attached and marked "Exhibit A;" and that said defendant railroad company is also entitled to all rights and benefits arising from the act of Congress approved March 1, 1877, amendatory of said right-of-way act, said amendatory act being found in volume 19 of U. S. Statutes, at page 405, to which reference is hereby made, and said statute is made a part of this agreed statement of facts, and copy thereof is hereto attached and marked "Exhibit B."

Second. ——

Mr. JONES. Now, as to the second paragraph of the statement of facts offered by defendant, I desire to object for the following reasons: First, as to the statement that certain portions of the defendant's railroad, 1,130 miles, was constructed under the act of June 8, 1872, and March 1, 1877, that it is irrelevant and immaterial, because the acts referred to are null and void for the reason stated in the objection heretofore made, and therefore conferred no rights upon the defendant company; and secondly, because the said acts are not properly in evidence in this case, and the reference
17 in that statement to the road which was constructed under the act of 1875 is irrelevant and immaterial, because it does not tend to prove any of the issues in the case.

The COURT. The objection will be overruled.

To which action of the court in overruling the said objection the plaintiff, by its counsel, then and there excepted.

Mr. VAILE (continuing). Second. That on the 8th day of June, 1882, the Denver and Rio Grande Railway Company, acting under and in accordance with the statutes of June 8th, 1872, and March 1st, 1877, herein above cited, had constructed 1,130 miles of its railway lines, and subsequent to the said 8th day of June, 1882, the said railway company and its successor in interest, the defendant, The Denver and Rio Grande Railroad Company, proceeding under the act of Congress of March 3rd, 1875 (18 U. S. Statutes, page 482), constructed 536 miles of railway in addition to said 1,130 miles heretofore constructed, no portion of which new construction was in the vicinity of the said lands described in the plaintiff's declaration.

Third. That the railroad lines so constructed prior to June 8th, 1882, extended through a portion of the land described in plaintiff's declaration in this cause, and for a distance of 100 miles west and 400 miles east and north from said lands.

Fourth. ——

Mr. JONES. As to the fourth paragraph of the statement of facts, I desire to object, not to that portion which states that the defendant appointed the New Mexico Lumber Company as its agent—the fact that the appointment I have no objection to—but as to the instrument in writing which is the appointment, I object to its introduction in evidence in this case, for the reason that it contains declarations in the interest of the defendant company; that the declaration therein contained
18 cannot bind the plaintiff in this case, and unless it is attempted to be shown by the railroad company, the defendant, that this

timber was taken for the purposes mentioned in the act of Congress, these recitals in the appointment of the lumber company, as agent of the railroad company, are irrelevant and immaterial; and the paper—the exhibit which is made a part of that statement of fact—contains recitals which would make the taking of the lumber for a lawful purpose apparently, if the act of Congress is properly in evidence and the defendant has the benefit of it. We do not think that the Government should be bound by any statement in that paper which appointed or constituted the lumber company the agent of the defendant railroad company, and so far as the general facts in this case are concerned, and all that the defendant offers to prove, it makes no difference whether the New Mexico Lumber Company was the agent of the railroad company or not, in the view which we take of this case, and on that theory we believe that the whole of the paragraph is objectionable as being incompetent, irrelevant, and immaterial.

The COURT. The objection will be overruled.

To which action of the court in overruling the said objection the plaintiff, by its counsel, then and there excepted.

Mr. VAILE (continuing). Fourth. That before the cutting of any of the 2,100,000 feet of lumber in the plaintiff's statement mentioned, the defendant railroad company appointed the said The New Mexico Lumber Company as its agent, to procure for it timber from the public lands of the United States. The appointment so made was in writing and a copy thereof and of the acceptance of the same is hereto attached and made a part hereof and marked "Exhibit C."

Fifth. ——

19 Mr. JONES. We object to the statement contained in the fifth paragraph of this statement of facts on the grounds that they are irrelevant and immaterial, and as a more specific objection, it is immaterial in this case whether the lumber was furnished to the railroad company upon written orders or not. The fact that it was furnished is only material in this case, and it is sought by this testimony and the form of order attached, to in some manner vindicate the defendant company, and these orders are mere declarations in interest, and are not competent or material evidence in this case. If introduced in evidence they could have no legitimate purpose or constitute any proper evidence to prove any of the issues in this case on behalf of the defendant or otherwise.

The COURT. The objection will be overruled.

To which action of the court, in overruling the said objection, the plaintiff, by its counsel, then and there excepted.

Mr. VAILE (continuing). Fifth. That all of said 2,100,000 feet of lumber delivered to the defendant railroad company as aforesaid was furnished upon specific orders in writing given by the defendant railroad company to said The New Mexico Lumber Company as its agent, said orders being in the general form, copy of which is hereto attached and made part hereof and marked "Exhibit D."

Sixth. ——

Mr. JONES. Now, if the court please, we object to the facts contained in paragraph six, because they are incompetent, irrelevant and immaterial, and because the act of Congress of June 8th, 1872, is not properly

in evidence in this case, and confers no right upon the defendant company to cut any timber from the public lands. It is immaterial as to the distance this timber may have been from the railroad. I will also interpose the general objection that the facts in said para-
20 graph are incompetent, irrelevant and immaterial for any purpose or for proving any of the issues in this case.

The COURT. The objection will be overruled.

To which action of the court, in overruling the said objection, the plaintiff, by its counsel, then and there excepted.

Mr. VAILE (continuing). Sixth. That all of said 2,100,000 feet of lumber so received by the defendant railroad company was cut from trees standing within a maximum distance of three miles from the main line of the defendant railroad company; that about one-third of the whole amount was cut within one mile of the said railroad line, one-third at a distance of more than one mile but not exceeding two miles, and the remaining one-third at a distance of more than two miles but not exceeding three miles from the said railroad line.

Mr. VAILE. We now offer in evidence Exhibit A, which is the statute of the United States approved June 8th, 1872, and found in 17 Stat. at Large, page 339. We also offer in evidence——

Mr. JONES. Well, if the court please, I assumed that they were already in evidence; that they were offered in connection with the paragraph which refers to them. I made the objection at that time upon that theory. I prefer that they be not put in separately as offered now, but they are in evidence as exhibits to the paragraphs.

Mr. VAILE. We prefer to have them offered separately. There is no objection to the stenographer repeating the objections in the record. All we want is a distinct offer of the statutes and the orders.

Mr. JONES. Then it will be understood that the objections I
21 made as counsel was reading the agreed statement of facts, as to these respective exhibits shall be considered as renewed at this time.

Mr. VAILE. Yes, sir.

Mr. JONES. Well, the record can show then, that the objections made at the time the statement of facts was read, and reference made to the exhibits, shall be considered as specifically made at this time to the introduction of the acts, and the appointment and acceptance, and form of orders.

The COURT. The record may show that. Also the rulings of the court upon the objections, and the exceptions taken, without repeating them again.

Mr. VAILE. We will offer Exhibit A.

"Exhibit A, from 17 U. S. Statutes at Large, page 339.

"Chapter CCCLIV. An act granting the right of way through the public lands to the Denver & Rio Grande Railway Company.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

"That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard room and side tracks, not exceeding twenty

acres at any station, and *and* not more than one station in every ten miles, and the right to take from the public lands adjacent thereto, stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line, be, and the same are hereby, granted and confirmed unto the Denver & Rio Grande Railroad Company, a corporation created under the incorporat'on laws of the Territory of Colorado, it successors and assigns; and all the rights, powers,
22 and franchises conferred by the said laws and corporations created under them for constructing and operating railroad and telegraph lines, are hereby ratified and confirmed to the above-named railway company, its successors and assigns; and the same rights, powers, and franchises conferred by the general incorporation laws of the Territory of Colorado for the construction of railroads and telegraph lines are hereby granted to the said company, its successors and assigns, for the extension and operation of its railway and telegraph line in and through any contiguous territory of the United States to the northern boundary line of Mexico, subject to the compliance with the conditions and requirements of the general incorporation laws of said territory, so far as the same are applicable and not inconsistent with the laws of the United States; and the same rights, powers, and privileges conferred upon the Union Pacific Railroad Company by section three of an act approved July second, eighteen hundred and sixty-four, are hereby conferred upon the above-named company, its successors and assigns:

"Provided, That applications for the assessment of damages shall be made to the court, or any judge of a court having jurisdiction in the county in which the lands or premises lie:

"Provided, That the said company shall complete its railway to a point on the Rio Grande as far south as Santa Fe, within five years of the passage of this act, and shall complete fifty miles additional south of said point in each year hereafter, and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road:

"And provided further, That nothing in this act contained
23 shall be construed as affirming or denying the right of any Territory to incorporate a railroad company.

"Approved June 8th, 1872."

Mr. VAILE. We offer in evidence the act of Congress approved March 1st, 1877, found in 19 Stat. at Large, page 405, marked Exhibit B.

"EXHIBIT B.

"Also the following act, amendatory of the foregoing and found in 19 U. S. Statutes at Large, at page 405, to wit:

"Chapter CXXVI. An act to amend an act entitled: 'An act granting the right of way through the public lands to the Denver & Rio Grande Railway Company,' approved June eighth, eighteen hundred and seventy-two.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

"That an act entitled: 'An act granting the right of way through the public lands to the Denver & Rio Grande Railway Company,' approved June eighth, eighteen hundred and seventy-two, be, and the same is

hereby, amended by making the second proviso in said act to read as follows, to wit:

"Provided, That said company shall complete its railway as far south as Santa Fe within ten years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter; and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road.

"Approved March 1st, 1877."

Mr. VAILE. We also offer in evidence Exhibit C, being the appointment of the New Mexico Lumber Company as the agent of the Denver & Rio Grande Railroad Company, to take the timber from the
24 public lands, and the acceptance thereof, which is as follows:

"EXHIBIT C.

"Whereas, by certain acts of Congress of the United States, the Denver & Rio Grande Railroad Company, in its own right, and as successor of the Denver & Rio Grande Railway Company, is authorized to take from the public lands adjacent to its line of railway, stone, timber, earth, water, and other material required for construction of its railway and telegraph lines constructed prior to the 8th day of June 1882; and

"Whereas said company is desirous of exercising said right of obtaining certain timber from the public lands of the United States, to be used in the construction of its said railway and telegraph line, and in the repair of that portion thereof constructed prior to June 8th, 1883; and

"Whereas said company can only exercise said right and take such timber through its agent duly authorized for that purpose:

"Now, therefore, be it known, that the said The Denver and Rio Grande Railroad Company doth hereby make, constitute, and appoint the following-named persons, to wit:

"The New Mexico Lumber Company of Azotea, New Mexico, its true and lawful agents to enter upon the public lands of the United States, adjacent to, or in the neighborhood of its line of railway, constructed or in process of construction, as aforesaid, on its behalf and under its direction, as hereinafter described, and for it to take therefrom such timber as may be necessary for the construction of its railway lines, and the repair of portions of the same, as above stated, and which is to be by it used in that behalf, as provided in the aforesaid acts of Congress.

25 "And be it further known, that the appointment and authorization hereby granted to the persons above named do not extend beyond the right to procure, as aforesaid, timber necessary for the purposes aforesaid, and do not confer upon the said person the right to commit any waste upon the public lands, or to cut, destroy, or take away any timber not required for the purposes aforesaid (and such cutting, destruction, and taking away of timber is hereby expressly prohibited), nor to commit any trespass or waste, as against the property of any private individuals owning or possessed of any property adjacent to or in the neighborhood of the lines of said railroad.

"And be it further known that none of the persons hereby appointed as aforesaid has or shall have any authority by virtue hereof to cut or

remove any timber as aforesaid, except so far and to such an extent and in respect to such amounts or quantities as said persons may be specially in writing authorized so to do.

"Dated at Denver, Colorado, this 14th day of March, A. D. 1893.

"The Denver and Rio Grande Railway Company," by C. M. Hobbs, purchasing agent.

"Be it known that we, the undersigned, the persons appointed in the foregoing instrument for the purpose therein mentioned, do hereby accept the appointment and agency thereby made and for the purpose therein set forth, and in consideration of said appointment we hereby agree and pledge ourselves: First, that in the cutting and procuring of timber as authorized by the terms of said instrument, we will not commit any waste upon the public lands, nor cut nor carry away any timber therefrom except for the sole purpose of supplying the said railroad company with the timber which may be required by it for the construction or repairs of its said railway lines, and that we will cut and procure the said
26 timber for the said purposes in such manner and in such amount only as we may from time to time be specially and in writing authorized so to do by the said railroad company; second, that we will commit no trespasses or waste against the property of any private individuals ow'ing or possessed of any property adjacent to or in the neighborhood of the said railroad; third, that in the cutting and procuring of the said timber for the said purpose, and to prevent the spread of fires upon public lands, we will cut or remove no timber less than eight inches in diameter, and will cut and pile the tops and laps of all trees felled in the procuring of the timber as aforesaid; fourth, that we will indemnify and save harmless the said railroad company against any trespass or waste committed by us upon the public lands and against any trespass or damage to the right of private individuals done by us or under us in violation of this appointment.

"Dated this 14th day of March, year of our Lord 1893.

"(Signed) NEW MEXICO LUMBER COMPANY.

"Correct copy.

"C. M. HOBBS,
"*Purchasing Agent.*"

Mr. VAILE. We offer in evidence Exhibit D, being the form of order under which the timber referred to in this controversy was cut and delivered to the railroad company, as follows:

"EXHIBIT D.

"ORDER NO. .

"PURCHASING AGENT'S OFFICE,
"DENVER AND RIO GRANDE RAILROAD COMPANY,
"*Denver, Colo.*, , *189* .

"To the NEW MEXICO LUMBER COMPANY:

"Whereas, by an instrument in writing, bearing date March 14th, 1893, you are appointed one of the lawful agents of the Denver
27 and Rio Grande Railroad Company to procure for and on its behalf from the public lands of the United States such timber as

may be necessary in the construction and repairing of the railway lines of the said railroad and for such purposes and under such conditions as are fully set forth in said instrument in writing; and

"Whereas you did, on the 14th day of March, 1893, accept such appointment as agent for said purposes and under said conditions:

"Now, therefore, in pursuance of said appointment and said acceptance, and in accordance with the conditions, terms, and stipulations therein contained, you are hereby authorized, for the said The Denver and Rio Grande Railroad Company, and on its behalf, to enter upon the public lands of the United States and to cut and procure timber thereon in the manner and in the amounts and within the time as follows, to wit:

(Here follows description of material required, differing in different orders.)

"Consign above timber .

"Care of .

"C. M. HOBBS,
Purchasing Agent."

Mr. VAILE. This is the case for the defendant.

The COURT. I will give the instruction No. 2 asked for by the defendants:

"The court instructs the jury that by the act of Congress of the United States the defendant railroad company had the right to take from the public lands in the declaration described such timber as was required for the repair to that part of its railroad and telegraph lines constructed prior to June 8th, 1882; that having such lawful right to cut timber on said lands for the purposes mentioned, the law presumes that whatever cutting was done there by it, or under its authority,
28 was in furtherance of the objects permitted by said statute and that the railroad company in so doing was acting in accordance to and within the terms of the said act of Congress and not in violation thereof. Under these circumstances the burden in this case is on the plaintiff to establish affirmatively, by a preponderance of the evidence, that the timber in the declaration mentioned was actually taken by the railroad company from the specific lands named in the declaration, and was used for some purpose or at some place not contemplated by the act of Congress. The plaintiff having offered no evidence to show that the defendant did use such timber for any purpose or at any place not so contemplated by said act of Congress, you are instructed to find a verdict for the defendant."

Mr. JONES. I except to the instruction of the court, for the reason that the instruction, as given, in effect instructs the jury that all of the lands described in the declaration, and from which the timber was taken, are "adjacent" to the line of the road, whereas there is in the evidence no proof which shows that all of the lands described in the declaration were "adjacent;" and that the question of adjacency is a mixed question of law and fact, and should have been submitted to the jury. Secondly, the instruction is erroneous in the statement of the proposition of law, that in a case of this nature the defendant is presumed to have taken the timber for the purposes authorized by the act of Congress of June 8th, 1872.

Further, the instruction presumes that the defendant is entitled to the benefit of the act of Congress of June 8th, 1872, whereas the same is null and void for uncertainty.

Again, the instruction is erroneous because it places upon the plaintiff the burden of proof to show that the timber delivered to the railroad company was not taken by it for the purposes mentioned in the act of Congress of June 8th, 1872.

29 Again, because the instruction ignores the rule of law, that the question as to whether the timber was taken for the purposes specified in the act of Congress, the repair of that part of its road constructed prior to the 8th of June, 1882, is within the peculiar knowledge of the defendant, and that it must be shown by the defendant.

Mr. JONES. The plaintiff further desires to except to the action of the court in refusing to give the instructions asked for by the plaintiff in the case; and, as to the instruction given, we desire to make the further objection that the court has failed to instruct the jury as to the law of the case.

The COURT. Gentlemen, I will hand you a form of verdict which one of your number may sign as foreman.

Mr. JONES. I will give formal notice of a motion for a new trial.

And be it further remembered that, upon the trial of said cause, the said plaintiff filed in said cause a stipulation which is in words and figures as follows, to wit:

In the district court of the first judicial district of the Territory of New Mexico, sitting in and for the county of Santa Fe.

THE UNITED STATES
vs.
THE DENVER & RIO GRANDE RAILROAD Company. } No. 842.

Agreed statement of facts.

For the purpose of trial and determination of the issues in the above-entitled cause, it is agreed that the facts offered by the plaintiff are as hereinafter set forth, and so far as the same are competent, material, and relevant the facts so agreed upon shall be taken as proved, but

30 the defendant shall have the right upon the trial to object to the introduction in evidence of said facts or any of them, on the ground that though admitted to be true they are incompetent, immaterial, or irrelevant.

1. Prior to the beginning of this suit the New Mexico Lumber Company, a corporation, was engaged in the general logging and lumbering business, and had a sawmill at Lumberton, on the Denver & Rio Grande Railroad, the same being on or in the immediate vicinity of the lands described in the plaintiff's declaration.

2. Prior to the beginning of this suit, the said the New Mexico Lumber Company did cut from the lands described in the declaration 2,100,000 feet of lumber, and the same to that amount was furnished to and received by the defendant railroad company for its use.

3. Prior to the time of said cutting, the said lands were public lands of the United States, situated in Rio Arriba County, New Mexico.

4. That the stumpage value of said timber so cut and delivered to the defendant railroad company was then $2.00 per 1,000 feet, and the value of the said lumber in the manufactured state was $9.00 per 1,000 feet.

5. The said New Mexico Lumber Company delivered the said 2,100,000 feet of lumber to the defendant railroad company during the period of time extending from January 1, 1894, to August 1, 1895, and during such period of time said lumber company, without authority from the defendant railway company, also cut from the lands described in the declaration 5,400,000 feet of lumber in addition to that delivered to the defendant company; that during said period of time the said lumber company did not cut from private lands exceeding 100,000 feet; that the timber taken by the said lumber company from the lands de-
31 scribed in the declaration was taken, as reached upon the said lands, without reference to size or dimensions, and all available sawmill timber was taken by the said company from the said lands and the logs piled upon the sawmill yard without reference to whether they would be used in filling orders from the defendant railroad company or not; that the agents of the said lumber company, at the time of the cutting of the said timber by it, knew that the said lands were the public lands of the United States, and that the said 5,400,000 feet of lumber was sold by the said lumber company upon the general market in the State of Colorado. Suit has heretofore been brought by the United States against said The New Mexico Lumber Company for said 5,400,000 feet of lumber and final settlement has been made of the suit so brought; that plaintiff does not seek in the present action to recover from the defendant railroad company anything for the taking by the said lumber company from said lands of the 5,400,000 feet above referred to, but no suit is pending against The New Mexico Lumber Company for the above mentioned 2,100,000 feet of lumber, nor has the plaintiff had any recovery or judgment for the same.

W. B. CHILDERS,
A. A. JONES,
Attorneys for Plaintiff.
WOLCOTT & VAILE,
E. L. BARTLETT,
Attorneys for Defendant.

And be it further remembered that upon the trial of said cause the said defendant filed in said cause a stipulation which is in words and figures as follows, to wit:

In the district court of the first judicial district of the Territory of New Mexico, sitting in and for the county of Santa Fe.

32 THE UNITED STATES
vs.
THE DENVER & RIO GRANDE RAILROAD Company. } No. 842.

Agreed statement of facts.

For the purpose of trial and determination of the issues in the above-entitled cause it is agreed that the facts offered by the defendant are as

hereinafter set forth, and so far as the same are competent, material, and relevant, the facts so agreed upon shall be taken as proved, but the plaintiff shall have the right upon the trial to object to the introduction in evidence of the said facts or any of them on the ground that, although admitted to be true, they are incompetent, immaterial, or irrelevant.

1. It is agreed that the defendant, The Denver & Rio Grande Railroad Company, is the successor to the Denver & Rio Grande Railway Company and at all times herein mentioned has been entitled to all the rights and benefits lawfully conferred upon the said The Denver & Rio Grande Railway Company by an act of Congress approved June 8th, 1872, entitled "An act granting the right of way through the public lands to the Denver & Rio Grande Railway Company," the same being found in 17 U. S. Statutes at page 339, to which reference is hereby made, and which said statute is made a part of this agreed statement and copy thereof is hereto attached and marked Exhibit A; and that said defendant railroad company is also entitled to all rights and benefits arising from the act of Congress approved March 1, 1877, amendatory of said right of way act, said amendatory act being found in volume 19 of U. S. Statutes at page 405, to which reference is hereby made, and said statute is made a part of this agreement of facts and copy thereof is hereto attached and marked Exhibit B.

33 2. That on the 8th day of June, 1882, The Denver and Rio Grande Railway Company, acting under and in accordance with the statutes of June 8th, 1872, and March 1, 1877, hereinabove cited, had constructed 1,130 miles of its railway lines, and subsequent to the said 8th day of June, 1882, the said railway company and its successor in interest, the defendant The Denver and Rio Grande Railroad Company, proceeded under the act of Congress of March 3rd, 1875 (U. S. Statutes, page 482), constructed 536 miles of railway in addition to said 1,130 miles theretofore constructed, no portion of which new construction was in the vicinity of the said lands described in plaintiff's declaration.

3. That the railroad lines so constructed prior to June 8th, 1882, extended through a portion of the lands described in plaintiff's declaration in this cause, and for a distance of more than 100 miles west and 400 miles east and north from said lands.

4. That before the cutting of any of the 2,100,000 feet of lumber in the plaintiff's statement mentioned, the defendant railroad company appointed the said The New Mexico Lumber Company as its agent, to procure for it timber from the public lands of the United States, the appointment so made was in writing, and copy thereof and of the acceptance of the same is hereto attached and made part hereof and marked Exhibit C.

5. That all of said 2,100,000 feet of lumber delivered to the defendant railroad company as aforesaid, was furnished upon specific orders in writing, given by the defendant railroad company to said The New Mexico Lumber Company as its agent, said orders being in the general form, copy of which is hereto attached and made a part hereof and marked Exhibit D.

6. That all of said 2,100,000 feet of lumber so received by the defendant railroad company was cut from trees standing within a maximum distance of three miles from the main line of the defendant railroad

34 company; that about one-third of the whole amount was cut within one mile of said railroad line, one-third at a distance of

more than one mile, but not exceeding two miles, and the remaining one-third at a distance of more than two miles, but not exceeding three miles from the said railroad line.

W. B. CHILDERS,
A. A. JONES,
Attorneys for the Plaintiff.
WALCOTT & VAILE,
E. L. BARTLETT,
Attorneys for Defendant.

And be it further remembered that thereafter on the 14th day of September, A. D. 1900, the plaintiff filed in said cause its motion for a new trial, which said motion is in words and figures as follows:

In the district court of the first judicial district of the Territory of New Mexico.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY, defendant. } No. 842.

Motion for a new trial.

Now comes the plaintiff in the above-entitled cause, by W. B. Childers and A. A. Jones, its attorneys, and moves the court to set aside a verdict of the jury heretofore at this term rendered in said cause, and to grant to the plaintiff a new trial thereof, and in support of said motion and as grounds therefor, the plaintiff says:

1st. The court erred in admitting in evidence at the request of the defendant, over the objections of the plaintiff, the act of Congress approved June 8th, 1872, and a copy of which said act was so introduced in evidence over the objection of the plaintiff, and marked Exhibit A.

2d. The court erred in admitting in evidence at the request of the defendant, and over the objection of the plaintiff, the act of Congress approved March 1st, 1877, and a copy of which was offered in evidence and marked Exhibit B.

3d. The court erred in admitting in evidence at the request of the defendant and over the objection of the plaintiff, the facts stated in paragraph two or division two of the agreed statement of facts offered by the defendant.

4th. The court erred in admitting in evidence at the request of the defendant and over the objection of the plaintiff, the facts stated in clause four of the agreed statement of facts offered in evidence by the defendant, and also erred in admitting in evidence over the objection of the plaintiff, the appointment of the New Mexico Lumber Company as the agent of the defendant, and the acceptance of the same, said appointment and the acceptance being introduced in evidence and marked Exhibit C.

5th. The court erred in admitting in evidence at the request of the defendant and over the objection of the plaintiff, the facts stated in paragraph five of the agreed statement of facts offered by the defendant, including the form of written orders marked Exhibit D.

6th. The court erred in admitting in evidence at the request of the defendant and over the objection of the plaintiff, the facts set forth in clause six of the agreed statement of facts offered by the defendant.

7th. The court erred in refusing to instruct the jury upon the request of the plaintiff as follows, to wit: The jury is instructed to return a verdict in favor of the plaintiff and against the defendant, for the sum of $18,000.

36 8th. The court erred in instructing the jury to find and return a verdict for defendant.

9th. The court erred in giving the second instruction requested by the defendant.

10th. The court erred in instructing the jury that the defendant had the right to take from the public lands in the declaration described, such timber as was required for the repairs to that part of its railway and telegraph lines constructed prior to June 8th, 1882.

11th. The court erred in instructing the jury that the law presumes that whatever cutting was done on the lands described in the declaration by the defendant, or under its authority, was in furtherance of the objects permitted by the statute of June 8th, 1882.

12th. The court erred in instructing the jury that the burden of proof in this case was on the plaintiff to establish affirmatively by the preponderance of the evidence that the timber in the declaration mentioned was actually cut by the railroad company from the specific lands named in the declaration, and was used for some other purpose or at some place not contemplated by the act of Congress of June 8th, 1872.

13th. The court erred in holding that the lands described in the declaration, and from which the timber was cut and delivered to the defendant company were adjacent to the line of the defendant's railroad constructed prior to June 8th, 1882.

14th. Because the verdict of the jury is contrary to the law and the evidence in the case.

Wherefore, the plaintiff prays the court to set aside the verdict and to grant it a new trial in said cause.

W. B. CHILDERS,
A. A. JONES,
Attorneys for the Plaintiff.

37 It is hereby agreed that the foregoing bill of exceptions may be settled, signed, and sealed by the judge of said court as the bill of exceptions on which the judgment in said cause may be reviewed by the supreme court, and further notice and time for proposing amendments thereto or for settling said proposed exceptions is waived.

W. B. CHILDERS,
A. A. JONES,
Attorneys for the Plaintiff.

WOLCOTT & VAILE,
E. L. BARTLETT,
Attorneys for Defendant.

And for as much as the matters herein set forth do not appear of record in this cause, the plaintiff hath prayed that the foregoing matters

and things be made a part of and constitute his bill of exceptions, in order that the same may become a part of the record in said cause, said bill of exceptions containing all of the evidence offered upon the trial of said cause, the foregoing bill of exceptions is hereby made a part of the record in this cause, and the same is signed and sealed this the 10th day of November, A. D. 1900.

[SEAL.]

JOHN R. MCFIE,
Associate Justice.

[Endorsements.]

No. 842.

District court, first judicial district.

UNITED STATES
vs.
DENVER & RIO GRANDE RAILROAD Company.
} Bill of exceptions.

Filed in my office Nov. 10th, 1900.

A. M. BERGERE, *Clerk.*

38 TERRITORY OF NEW MEXICO,
First Judicial District.

I, A. M. Bergere, clerk of the district court of the first judicial district of the Territory of New Mexico, do hereby certify that the foregoing thirty-five pages contain a true, correct, and complete transcript of the record and proceedings had in a cause lately pending in said court, wherein the United States of America was plaintiff and the Denver & Rio Grande Railroad Company was defendant, as the same now appears of record in my said office.

In witness whereof I have hereunto set my hand and the seal of said district court, at my office in the city of Santa Fe, district and Territory aforesaid, this 16th day of November, A. D. 1900.

[SEAL.]

A. M. BERGERE,
Clerk U. S. Court.

39 And afterwards, on, to wit, the ninth day of January, A. D. 1901, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors, which said assignment of errors was and is in words and figures as follows, to wit:

In the supreme court of the Territory of New Mexico, January term, A. D. 1901.

UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE DENVER & RIO GRANDE RAILroad Company, defendant in error.
} No. 885. Error to the district court, first judicial district.

Assignment of errors.

Now comes the plaintiff in error, the United States of America, by her attorneys, and says, that in the record and proceedings of the district

court of the first judicial district of the Territory of New Mexico in the above-entitled cause there is manifest error in this, to wit:

First. The court erred in admitting in evidence at the request of the defendant, over the objections of the plaintiff, the act of Congress approved June 8th, 1872, and a copy of which said act was so introduced in evidence over the objection of the plaintiff, and marked "Exhibit A."

2nd. The court in admitting in evidence at the request of the defendant, and over the objection of the plaintiff, the act of Congress approved March 1st, 1877, and a copy of which was offered in evidence and marked "Exhibit B."

40 3rd. The court erred in admitting in evidence, at the request of the defendant, the facts stated in paragraph two or division two of the agreed statement of facts offered by the defendant.

4th. The court erred in admitting in evidence, at the request of the defendant, and over the objection of the plaintiff, the facts stated in clause four of the agreed statement of facts offered in evidence by the defendant; and also erred in admitting in evidence, over the objection of the plaintiff, the appointment of the New Mexico Lumber Company as the agent of the defendant, and the acceptance of the same, said appointment and acceptance being introduced in evidence and marked "Exhibit C."

5th. The court erred in admitting in evidence, at the request of the defendant, and over the objection of the plaintiff, the facts stated in paragraph five of the agreed statement of facts offered by the defendant, including the form of written orders marked "Exhibit D."

6th. The court erred in admitting in evidence, at the request of the defendant, and over the objection of the plaintiff, the facts set forth in clause six of the agreed statement of facts offered by the defendant.

7th. The court erred in refusing to instruct the jury upon the request of the plaintiff, as follows, to wit:

"The jury is instructed to return a verdict in favor of the plaintiff, and against the defendant, for the sum of $18,000."

8th. The court erred in instructing the jury to find and return a verdict for the defendant.

9th. The court erred in giving the second instruction requested by the defendant.

41 10th. The court erred in instructing the jury that the defendant had the right to take from the public lands, in the declaration described, such timber as was required for the repairs to that part of its railway and telegraph lines constructed prior to June 8th, 1882.

11th. The court erred in instructing the jury that the law presumes that whatever cutting was done on the lands described in the declaration by the defendant, or under its authority, was in furtherance of the objects permitted by the statute of June 8th, 1882.

12th. The court erred in instructing the jury that the burden of proof in this case was on the plaintiff to establish affirmatively by the preponderance of the evidence that the timber in the declaration mentioned was actually cut by the railroad company from the specific lands named in the declaration, and was used for some other purpose or at some place not contemplated by the act of Congress of June 8th, 1872.

13th. The court erred in holding that the lands described in the declaration, and from which the timber was cut and delivered to the

defendant company, were adjacent to the line of the defendant's railroad constructed prior to June 8th, 1882.

14th. Because the verdict of the jury is contrary to the law and the evidence in the case.

15th. The court erred in overruling the motion for a new trial filed by the plaintiff in said cause.

Wherefore, for the above and many other manifest errors in said record appearing on the face thereof, plaintiff in error prays that the
42 judgment of the district court in said cause be reversed and held for naught and that this court may enter up judgment in this case in favor of the plaintiff for the sum of $18,900.00.

(Signed) ANDRIEUS A. JONES,
Special Assistant United States Attorney.

(Signed) WM. B. CHILDERS,
United States District Attorney.

Which said assignment of errors were endorsed as follows, to wit:

No. 885. In the supreme court of the Territory of New Mexico. January term, A. D. 1901.

UNITED STATES OF AMERICA, PLAINTIFF in error, *vs.* THE DENVER & RIO GRANDE RAILROAD Company, defendant in error.	Error to district court first judicial district.

Assignment of errors.
Filed in my office this Jan. 9, 1901.

JOSE D. SENA, *Clerk.*

And afterwards on, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, A. D. 1901, on the twelfth day thereof, the same being Tuesday, the 22nd day of January, the following among other proceedings were had as follows, to wit:

43 THE UNITED STATES OF AMERICA, plaintiff in error, *vs.* THE DENVER & RIO GRANDE RAILROAD Company, defendant in error.	No. 885. Error to district court first judicial district.

It is ordered by the court that this cause be, and it is hereby, set for hearing for the 23rd day of January, A. D. 1901.

And afterwards on, to wit, on the thirteenth day of said regular term, the same being Wednesday, January 23rd, A. D. 1901, the following, among other proceedings, were had as follows, to wit:

THE UNITED STATES OF AMERICA, plaintiff in error, *vs.* THE DENVER & RIO GRANDE RAILROAD Company, defendant in error.	No. 885. Error to district court first judicial district.

This cause coming on to be heard upon the transcript of record, assignment of errors, and briefs of counsel, is argued by A. A. Jones, esq., for plaintiff in error, and Wm. Field, esq., and E. L. Bartlett, esq., for defendant in error, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards on, to wit, on the thirtieth day of said regular term, the same being Wednesday, the 2nd day of October, A. D. 1901, the following, among other proceedings, were had as follows, to wit:

44

THE UNITED STATES OF AMERICA, plaintiff in error, *vs.* THE DENVER & RIO GRANDE RAILROAD Company, defendant in error.	No. 885. Error to district court first judicial district.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Parker, Chief Justice Mills, and Associate Justices Crumpacker and McMillan, concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file; it is therefore considered and adjudged by the court that the judgment of the district court in and for the first judicial district, whence this cause came into this court, be, and the same hereby is, affirmed, and that in accordance therewith, it is ordered, considered, and adjudged by the court that the said defendant in error, The Denver & Rio Grande Railroad Company, as to said charge, go hence without day, and it hereby is discharged, and it is so ordered.

And afterwards on, to wit, on the 14th day of January, A. D. 1902, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an affidavit of value, which said affidavit of value was, in words and figures, as follows, to wit:

In the Supreme Court United States of America.

UNITED STATES OF AMERICA, PLAINTIFF IN error, *vs.* THE DENVER & RIO GRANDE RAILROAD Company, defendant in error.	Error to the supreme court of the Territory of New Mexico.

45 Andrieus A. Jones, of lawful age, being duly sworn, upon his oath says: That he, as special assistant United States attorney, represented the plaintiff in error in the above-entitled cause in the district court and supreme court of the Territory of New Mexico, and that the value of the matter in dispute is more than five thousand ($5,000) dollars.

(Signed) ANDRIEUS A. JONES.

TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

On this 11th day of January, A. D. 1902, before me, the undersigned, a notary public in and for the county and Territory aforesaid, personally came Andrieus A. Jones, who, being by me duly sworn, did depose and say that the foregoing affidavit by him subscribed is true.

Witness my hand and notarial seal the day and year last above written.

[SEAL.] (Signed) W. E. GORTNER,
Notary Public.

My commission expires February 11th, 1904.

Said affidavit was and is endorsed as follows:

In the supreme court Territory of New Mexico.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE DENVER & RIO GRANDE RAILROAD COMPANY, defendant in error.
} Affidavit of value.

Filed in my office this Jan. 14, 1902.

JOSE D. SENA, *Clerk.*

46 And afterwards, on, to wit, the 14th day of January, A. D. 1902, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a precipe for a writ of error and citation to the Supreme Court of the United States, which said precipe was and is in words and figures as follows, to wit:

"JANUARY 10TH, 1902.

"Hon. JOSE D. SENA,
"*Clerk of the Supreme Court, Santa Fe.*

"DEAR SIR: Will you please issue a writ of error in the usual form for the transfer to the Supreme Court of the United States from the supreme court of the Territory of New Mexico that certain cause lately decided *decided* in said supreme court of the Territory of New Mexico, numbered 885, wherein the United States of America was plaintiff in error and The Denver & Rio Grande Railroad Company was the defendant in error.

"You will please also issue a citation and forward the same to me for service.

"I enclose an affidavit of the amount involved in the suit which you will please file with the other papers in the case.

"Very truly, yours,

"A. A. JONES,
"*Special Assistant U. S. Attorney.*"

And afterwards, on, to wit, the 2nd day of October, there was filed in the office of the clerk of the supreme court an opinion of the court, which said opinion is in words and figures as follows, to wit:

47 In the supreme court of the Territory of New Mexico, January term, A. D. 1901.

UNITED STATES OF AMERICA, PLAINTIFF in error, *vs.* THE DENVER & RIO GRANDE RAILROAD Company, defendant in error.	No. 885. Error to district court, first judicial district.

SYLLABUS.

1. Under the act of the Territorial legislature, approved February 7th, 1899 (session laws of 1889, page 45), it was not necessary to plead special acts of Congress to authorize their introduction in evidence.

2. The decision of this court upon a first writ of error upon all points actually and necessarily determined becomes the law of the case and binding upon the parties and this court upon a second writ of error, when the facts are substantially the same in both instances. The rule also includes all questions necessarily determined in reaching the specific decision announced.

3. Lands within three miles of the track of the Denver & Rio Grande Railroad Company are "adjacent" lands within the meaning of the acts of Congress of June 8th, 1872 (17 Stat., 339), and March 1, 1877 (19 Stat., 405).

ANDRIEUS A. JONES,
Special Assistant U. S. Attorney.
W. B. CHILDERS,
United States Attorney for Plaintiff in Error.
WALCOTT & VAILE,
WILLIAM W. FIELD, and
EDWARD L. BARTLETT,
For Defendant in Error.

OPINION OF THE COURT.

PARKER, J.:

This case was in this court before, and was reversed and remand-
48 ed for a new trial. (9 N. M., 382.) At that time we determined, from the record before us, that the defendant in error, under certain special acts of Congress, had the right to cut such timber from the public lands adjacent to its line as was necessary for the repair of such portion of its road as was constructed prior to June 8th, 1882. We further determined that the burden of proof to show a violation of the terms of the grant was upon the United States. The case was retried, under the mandate of this court, and the proofs submitted were, in substance and effect, the same as on the former trial. At the close of the testimony the court directed a verdict for the defendant in error.

The proof showed that the defendant in error, through its agent, cut and used 2,100,000 feet of lumber from trees standing within a maximum distance of three miles from its main line of track. No proof was offered by either party as to what use was made of such lumber.

Plaintiff in error complains of the judgment for the following reasons:

First. Upon the case made out by the plaintiff the court should have instructed the jury to return a verdict for the plaintiff for the sum of

$18,000, and, if no proper defense was made, the court should now enter up judgment against the defendant for that amount.

Second. If the defendant relied upon the special acts of Congress as a defense, it was necessary that such acts should have been specially pleaded.

Third. The burden of proof was on the defendants to show that the timber was taken for the purpose authorized by the special acts of Congress, and no evidence for this purpose was offered.

Fourth. The act of Congress of June 8th, 1872, so far as the same related to the taking of timber from the public lands for the purpose of repairing defendant's road, is void.

49 Fifth. If the act was not void, the land from which the timber was taken was not all adjacent to the line of defendant's road.

1. The second point presented—as to the inadmissibility of the special acts of Congress under the pleadings—will be first noticed. The declaration in this case was framed in accordance with the provisions of an act of the Territorial legislature approved February 7th, 1889 (Session Laws of 1889, p. 45); likewise the plea in the case was framed in accordance with the provisions of that act. That act provided certain short forms of pleading, which were declared to be sufficient in all actions at law. An entire departure was contemplated by this act from the established forms and requirements of common-law pleading, and while it may be conceded as a general proposition that special acts of a legislature must be pleaded before they will be admissible in evidence, still we are not prepared to say that, in view of the radical changes made by this statute, these acts of Congress were not admissible under the plea of not guilty filed by the defendant in error in this case. No useful purpose could be subserved in remanding this cause for a new trial upon the ground that the acts of Congress mentioned were improperly admitted in evidence, as the defendant in error would be at liberty to at once amend his plea in this regard, if necessary, and a retrial of this cause would necessarily result in the same judgment.

We therefore hold that the special acts of Congress introduced by defendant in error were properly admissible under the plea filed in this cause, and that the second assignment of error is consequently not well founded.

2. The third question presented is in regard to the burden of proof as to the lawful or unlawful use of timber by defendant in error. This question was determined by this court on the former appeal, and we held the burden to be upon the United States.

50 The fourth claim is that these acts of Congress are void for uncertainty, by reason of the use of the word "adjacent" to indicate the lands from which timber may be cut by defendant in error, and which it is claimed is so incapable of definition as to render the acts void. This was necessarily determined adversely to the plaintiff in error on the former appeal, when we declared that the acts were a solemn grant to the defendant. It would be absurd to say that these acts were a solemn grant of a right to the defendant in error, if they were at the same time so uncertain in terms so as to be void. It was necessary for this court to determine that they were valid in order to say that they were a solemn grant to the defendant in error.

The determination that the burden of proof, as to the lawful or unlawful

use of the timber by the defendant in error, was upon the Government, necessarily determines the first question presented, for no proof whatever was tendered by the Government to meet this burden. Consequently, no right of recovery was shown. Under these circumstances it is contended by the defendant in error that plaintiff in error is concluded by the former judgment of this court, and we think the contention well founded. It is an established and almost universally recognized rule that every question which is actually and necessarily determined in a case by an appellate court is "the law of the case," and, right or wrong, is conclusively binding upon the parties and the courts until overruled by some higher court of appeal. Elliott's Appellate Procedure, sec. 578; 2 Ency. P. & P., 372-381; Note to Hastings v. Foxworthy, 34 L. R. A. 321, sec. 45 Neb., 676; Balch v. Hass, 73 Fed., 974; Thatcher v. Gottlieb, 59 Fed., 872; Barney v. R. R. Co., 117 U. S., 228; Bridge Co. v. Stewart, 3 How. (U. S.), 413; Tyler v. Magwire, 17 Wall. (U. S.), 253; Supervisors v. Kennicott, 94 U. S., 498; Clark v. Keith, 106 U. S., 464; Rupe v. New Mexico Lumber Association, 3 N. M., 555; Green v. Springfield, 130 Ills., 515; Crary v. Field et al. (N. M.), 61 Pac., 118.

51 This rule applies not only to questions specifically decided, but also to those questions which are necessarily involved in reaching the decision specifically announced. Hutchison v. Railway Co., 41 Wis., 541; Headley v. Challiss, 15 Kan., 453, per Brewer, J.; Croockett v. Gray, 31 Kan., 346; Joslin v. Cowee, 56 N. Y., 626; Williams v. Rogers, 14 Bush. (Ky.), 776; Stuart v. Heiskell, 86 Va., 191; and see note to Hastings v. Foxworthy, 34 L. R. A., 321; 2 Ency, P. & P., 380.

While in our former decision only one of these questions was specifically presented and decided, the other was necessarily involved in determining this one question. When we said that these acts of Congress were a solemn grant to the defendant in error, we decided, necessarily, that they were valid. If the plaintiff in error had anything to say upon this subject it had at that time an opportunity to speak and urge all of the propositions now presented. Consequently we hold that the United States cannot now be heard, not only tne parties, but also the court, being bound by the former judgment.

3. The last question presented is as to whether lands within three miles of the track of defendant in error are "adjacent," within the meaning of the acts of Congress referred to. No point is made that the facts should have been submitted to the jury under proper instructions, but the bare legal proposition is presented that as a matter of law these lands are not "adjacent" to the road. We will content ourselves by citing one case which arose in this jurisdiction and which seems conclusive. Bacheldor v. United States, 83 Fed., 986. This case arose by way of a prosecution by the United States for unlawful timber cutting. The defendant justified as agent of this same defendant in error, and under these same acts of Congress. The court held that lands twenty-five miles distant by wagon road from the railroad could not be held as a matter of law

52 not to be adjacent, within the meaning of these acts of Congress. This reversed this court in the same case, 9 N. M., 15. We are not aware of any decision of the United States Supreme Court which has modified or overruled this case. We therefore hold that lands within three miles of the railroad of defendant in error are "adjacent" lands within the meaning of the grant to it by Congress.

For the reasons assigned, the judgment below will be affirmed. And it is so ordered.

FRANK W. PARKER,
Associate Justice.

We concur: William J. Mills, C. J., J. W. Crumpacker, A. J., Daniel H. McMillan, A. J.

McFie, J., having tried the case below, took no part in this decision.

Filed October 2nd, 1901.

TERRITORY OF NEW MEXICO,
Supreme Court, s. s.

I, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a full, true, complete, and perfect transcript of the record and proceedings, pleadings, and opinion filed in the above entitled cause which is transmitted to the Supreme Court of the United States in accordance with the writ of error hereto attached.

Witness my hand and the seal of the supreme court of the Territory of New Mexico, this the 16th day of January, A. D., 1902.

[SEAL] JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

53 *The United States of America, to the Denver and Rio Grande Railroad Company, greeting:*

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein the United States of America was plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 14th day of January, A. D. 1902.

[SEAL.] WILLIAM J. MILLS,
Chief Justice of the Supreme Court of the Territory of New Mexico, etc.

Service of a copy of the above citation is hereby accepted and acknowledged this 17th day of January, A. D. 1902.

WOLCOTT & VAILE AND EDWARD L. BARTLETT,
Attorney' for defendant in error.

54 (Indorsed:) File No. 18391. Supreme Court U. S., October term, 1901. Term No. 538. The United States, plff. in error, vs. the Denver & Rio Grande R. R. Co. Citation and proof of service. Filed Feby. 11, 1902.

55 (Indorsement on cover:) File No. 18391. New Mexico Territory supreme court. Term No. 231. The United States, plaintiff in error, vs. the Denver and Rio Grande Railroad Company. Filed February 1st, 1902.